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United Nations Commission on International Trade Law
Thirty-second session

Summary record of the 659th meeting
Held at the Vienna International Centre, Vienna, on Wednesday, 26 May 1999, at 9.30 a.m.

Chairman: Mr. Renger ..... (Germany)

Contents

Privately financed infrastructure projects (*continued*)

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Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum.

V.00-51970 (E)

Distr.: 14 March 2000

The meeting was called to order at 9.45 a.m.

Privately financed infrastructure projects (*continued*) (A/CN.9/458 and Add.1-9)

Chapter VI. End of project term, extension and termination (*continued*) (A/CN.9/458/Add.7)

General suggestions concerning the drafting of chapter VI (*continued*)

1. **Mr. Lortie** (Observer for Canada), expanding on the suggestion he had made at the previous meeting, said that his delegation considered that the notes on the legislative recommendations were well balanced. There was a general principle and various exceptions to that principle in each case. His delegation's suggestion was that the recommendations should begin in each case with the general principle and then list the exceptions. That approach could be adopted not only with recommendation 2 but also with recommendations 1, 3 and 4.

2. **Ms. Nikanjam** (Islamic Republic of Iran) endorsed that suggestion, saying that it would result in a balanced text.

3. **Mr. Lalliot** (France), supported by **Mr. Mazini** (Observer for Morocco), welcomed the Canadian suggestion. The Secretariat should be left to find the appropriate wording for the chapeau of the recommendation in each case.

4. **The Chairman** said he took it that the Commission wished to adopt the Canadian suggestion.

5. **Mr. Wiwen-Nilsson** (Observer for Sweden) said that, at the previous meeting, the Secretariat had requested an indication of how delegations saw the different consequences of different kinds of termination of the project agreement, and he would like to respond.

6. There were five possible reasons for a premature termination: impeding events; acts of the contracting authority and other governmental agencies; termination for convenience by the contracting authority; breach by the contracting authority; and breach by the concessionaire. Termination following impeding events related only to events for which the concessionaire had not assumed the risk. In such a case, the compensation paid to the concessionaire would correspond to the investment made, unless already recovered by project revenues (including any subsidy received from the contracting authority, etc.), plus costs entailed by termination. That would include the outstanding debt and equity, but not lost profits.

7. In cases of termination due to acts of the contracting authority or other government agencies, the compensation payable would be similar but might in some cases also include compensation for lost profits.

8. In cases of termination for convenience and termination due to breach by the contracting authority, the compensation would again be similar but would include lost profits.

9. In cases of termination due to breach by the concessionaire, the lenders would have to accept the risk and there would in principle be no payment, except that the contracting authority would pay the residual value of the assets, taking into account investment not recovered from project revenues, unless the contracting authority could demonstrate that the assets had a lower market value. There might also be claims for damages by the contracting authority against the concessionaire although it might not be realistic to expect that a company specially established to implement the project would have the means to honour such claims.

10. In the case of normal expiry of the project agreement, all assets needed for the continuous operation of the service should be returned to the contracting authority free of charge, except for assets that had not been foreseen in the concessionaire's initial investment estimate but which the concessionaire had been required to build or acquire pursuant to subsequent requests by the contracting authority.

11. **Mr. Estrella Faria** (International Trade Law Branch) thanked the observer for Sweden for his very detailed analysis. However, he recalled that the Commission had been urged not to be too prescriptive on what the standards of compensation should be in the various situations, as some of the points were debatable. He suggested that the Secretariat should incorporate the points made by the observer for Sweden as an explanation of the practice in some countries but not as recommendations.

12. **Mr. Mazilu** (Romania) endorsed that suggestion.

13. **The Chairman** said that he took it that the suggestion had the approval of the Commission.

14. **Mr. Maradiaga** (Honduras) said that the word "*rescisión*" used in the Spanish version of the draft guide as the equivalent of "termination" raised problems for his

country. In the translation of the expression "termination for convenience", for example, "*terminación*" would be a more appropriate term.

15. **Mr. Wallace** (United States of America) asked the observer for Sweden why he felt that the treatment of lost profits in the case of termination due to acts of the contracting authority or the Government should be different from their treatment in the case of termination for convenience or breach by the contracting authority.

16. **Mr. Lalliot** (France) wondered whether the recommended procedure in the case of impeding events was not tantamount to making the contracting authority bear the whole risk for *force majeure* situations.

17. Like the United States representative, he did not fully understand the distinction made between the second, third and fourth kinds of termination mentioned.

18. In the case of normal expiry of the agreement, he considered, with all due respect, that the presentation in the draft guide was clearer than in the Swedish analysis.

19. **Mr. Darcy** (United Kingdom) said that the Commission might be interested to hear that, because of a policy change, the United Kingdom had just terminated a large concession project for reasons of convenience of the contracting authority. He would inform the Secretariat of the compensation details, which might be a good practical example for the guide.

20. **Mr. Gill** (India) said that the Swedish proposal did not appear to strike a balance. It seemed to give a greater burden to the contracting authority in regard to compensation, making it more attractive to the concessionaire, who could apparently retain subsidies. Some clarification was needed.

21. **Mr. Wiwen-Nilsson** (Observer for Sweden), replying to the last point, said that what he had meant was that any subsidy received would be subtracted in calculating the value of the investment made for purposes of compensation. That would benefit the contracting authority rather than the concessionaire.

22. In reply to the questions of the United States and French representatives on the reason for the distinction in the treatment of termination for acts of the contracting authority, termination for convenience and breach by the contracting authority, he said that acts of the contracting authority or, in particular, other government agencies, such as revoking or refusing a permit, were different from an actual breach of the agreement. Termination for convenience and breach by the contracting authority should certainly justify compensation for lost profits.

23. With regard to "impeding events", whether the risk was absorbed by the concessionaire would depend on the agreed allocation of risks. He was not speaking of a general *force majeure* clause.

24. **The Chairman** said that those explanations would be noted.

Chapter VII. Governing law (A/CN.9/458/Add.8)

25. **Mr. Estella Faria** (International Trade Law Branch) said that while sections A and B of draft chapter VII were new, but the substance of sections C and D had been contained in an earlier version of draft chapter I on general legislative considerations on which the Commission had had an extensive discussion at its thirty-first session (see document A/53/17, paras. 63-95). The discussion of other areas of law relevant to privately financed infrastructure projects had now been considerably expanded.

General remarks, and the law governing the project agreement (legislative recommendation 1 and paras. 4 and 5)

26. **Mr. Lalliot** (France) said that chapter VII was too ambitious and went into too much detail in some places, for instance on guarantees, though not enough in others, for instance on labour law. The meaning of the title was unclear, at least in French. Privately financed infrastructure projects were complex and were governed by the full range of the host country's laws, which it would be quite impossible for the guide to address in exhaustive fashion. Some of the points developed, while interesting, were rather less well balanced than in other parts of the guide.

27. Legislative recommendation 1 seemed to be more declaratory than operational. Probably no government could indicate which out of thousands of legislative provisions were applicable to privately financed infrastructure projects.

28. Paragraphs 3 and 4 of the notes seemed to give a mainly precautionary message. However, he was unhappy with the penultimate sentence of paragraph 4 if it implied that rules derived from jurisprudence, for example, were not mandatory. Perhaps the text should say that the applicable law in some legal systems was not necessarily written law and not necessarily contained in laws and regulations, but could derive from other sources of law such as jurisprudence.

29. **Mr. Wallace** (United States of America) congratulated the Secretariat on the work it had done. He partly shared the French representative's views on recommendation 1; however, he also noted the lack of any reference to private international law or choice of law.

30. After paragraph 2 of the notes it might be advisable to include a new paragraph drawing attention to chapter VIII on settlement of disputes.

31. He suggested that in the fourth sentence of paragraph 4 the words "those dealing with" should be added before the words "environmental protection measures".

32. With regard to paragraph 5, not only would it be difficult to list all the laws directly applicable to publicly financed infrastructure projects but it was just conceivable that a concessionaire might argue that it should not have to accept liability under a law that had not been listed. It should therefore be made clear that the list was not exhaustive. In fact, it might be better to deal with the subject in a brochure.

33. **Mr. Darcy** (United Kingdom) agreed that the chapter was over-ambitious. He was not sure why the subject of governing law had been given its own chapter; other matters, such as regulatory issues, might have been more worthy of one.

34. The notes represented a fairly good discussion of the issues involved, but the content should be shortened and reincorporated in chapter I.

35. **Ms. Gioia** (Italy) agreed with what had been said. It would be impracticable for a legislative provision to give an exhaustive list of statutory or regulatory texts governing the project agreement. She also agreed that the chapter was too ambitious.

36. **Mr. Choukri Sbaï** (Morocco) said that the chapter was one of the most important in the guide but that its title was inappropriate. He suggested that it might be amended to read "Law governing the risks of the project".

37. In connection with the third sentence of paragraph 4, which stated that "in some countries the project agreement may be subject to administrative law, while in others the project agreement may be governed by private law", he said that the project would often be subject to both administrative and private law.

The meeting was suspended at 11 a.m. and resumed at 11.30 a.m.

38. **Mr. Gill** (India) asked whether recommendations 1 and 2 meant that the application of the law of the land could be excluded, and that lenders and insurers, for example, would be able to give the concessionaire immunity from local law. The interests of the developing countries needed to be protected.

39. **Mr. Phua Wee Chuan** (Singapore) agreed that chapter VII was too ambitious and its title misleading, since it did not deal with governing law in the contractual sense but rather with the domestic legal provisions applicable to the project agreement. He endorsed the view that it would be enough to put a summary of the chapter in chapter I. He saw little value in the first part of recommendation 1, since all statutory texts of the host country would apply to the project agreement. Moreover, before entering into a project agreement, a concessionaire or lender would in practice obtain the legal opinion of a private lawyer in the host country on the legal provisions applicable.

40. With regard to the second part of the recommendation, there would be some merit in adopting provisions identifying statutory texts that were not applicable. For instance, to attract investors the host country might exclude the application of a certain tax law.

41. **Mr. Lortie** (Observer for Canada) suggested that recommendation 1 should be amended to read: "The host country may wish to stipulate that the law governing the project agreement be, unless otherwise provided, the law of the host country."

42. **Ms. Nikanjam** (Islamic Republic of Iran) said that the chapter contained useful suggestions that could apply to all legal systems. In her delegation's view, the Commission should adopt the general principle that the law governing the project agreement was the law of the host country. She knew of cases where concessionaires had tried to make acceptance of a foreign country's law as the governing law a condition for concluding a project agreement. Her delegation would be against placing the provisions of the chapter elsewhere.

43. **Mr. Wallace** (United States of America) said that, to the extent that the title of the chapter was misleading, it should be changed. He did not agree that the chapter should be shortened, since without its detail legislators would be misled about the amount of work needed, which might well include reforming many areas of law. It was essential to have a favourable investment climate and the 12 areas listed, and perhaps others, were very important.

44. With regard to recommendation 1, Governments had great leverage and should not underestimate their ability

to resist investors who wished to have total freedom in their choice of law.

45. The Canadian suggestion was acceptable to him.

46. **Mr. Mazilu** (Romania) said that if chapter VII was retained as a separate chapter, it would need another title, to clarify its purpose.

47. **Mr. Morán Bovio** (Spain) said that chapter VII was necessary and should not be combined with other chapters. The structure was appropriate for a legal guide focusing on the practical matters that needed to be taken into account in drafting contracts. There was no need for many adjustments to the draft chapter and the title was an appropriate expression of the chapter's contents—namely, the laws that would govern privately financed infrastructure projects.

48. **Mr. Phua Wee Chuan** (Singapore) said that it was a fact that government lawyers would never suggest the use of a governing law other than that of the host country. However, the Commission's practice was to recognize freedom of contract. The Secretariat could perhaps find wording that would strike a balance between the two approaches.

49. **Mr. Wiwen-Nilsson** (Observer for Sweden) said that what was meant by governing law in the first instance was the law governing the contractual relationship between the parties. On most other matters, the law of the host country would apply. The text of the chapter was generally satisfactory, but the reference to environmental protection measures and health and labour conditions in the fifth sentence of paragraph 4 of the notes was out of place in the part of the notes dealing with the law governing the project agreement.

50. **Mr. Lalliot** (France) supported the Canadian suggestion for amending recommendation 1.

51. **Mr. Zanker** (Australia) endorsed the remarks of the United States representative on the value of the chapter, in view of the work that would have to be done in countries wishing to encourage private investment in infrastructure projects, in terms of reforming their domestic legislation to attract such investment. There was no harm in the Commission's pointing to the possible need for reform in areas such as intellectual property law, security interests, company law, accounting practices and even migration law.

52. He agreed that the title of the chapter needed to be changed, and he could accept the Canadian suggestion regarding recommendation 1.

53. **Mr. Maradiaga** (Honduras) said that his country, which was seeking aid after the disaster that had struck it, would find the guide, especially chapter VII, useful because it would help in efforts to provide legal certainty for foreign investors. The Commission was doing good work.

54. **Mr. Markus** (Observer for Switzerland) recognized that chapter VII was useful, but thought that it was rather ambitious and might be shortened.

55. The drafting of the heading above recommendation 1 could perhaps be improved. However, he could support the Canadian suggestion for amending the text of the recommendation.

56. **Mr. Wallace** (United States of America) thought that the title of recommendation 1 should be retained, but the text amended along the lines of the Canadian suggestion.

57. A reference in the notes to the need for due regard for the principle of freedom of contract would be helpful.

58. **Mr. Estrella Faria** (International Trade Law Branch) apologized for any confusion arising from the title of the chapter. In most cases, as was clear from paragraphs 3 to 5 of the notes, the laws of the host country would apply. It was not the Secretariat's intention to suggest that the agreement itself might be subject to foreign law.

59. The issue of conflict of law would only be relevant to contracts entered into between the concessionaire and other parties such as lenders; such contracts which would often in any case be subject to foreign law because entered into outside the host country. The issue, although peripheral, was discussed briefly in paragraphs 6 to 8 of the notes.

60. In recommendation 1 it had not been the intention to suggest that there should be an exhaustive list of all laws that might apply to the project agreement. Paragraph 5 of the notes spoke of texts that were "directly applicable". It might be appropriate, for example, for the legislative provisions to refer back to the general procurement regime.

61. With regard to statutory or regulatory texts whose application was excluded, he would give a relevant example. In a large transport project in Europe the concessionaire's entitlement to raise the level of tariffs had

been challenged in court by a private party invoking a provision of the country's civil code concerning prices for services. As a result, the entire financial arrangement for the project had had to be renegotiated because the tariff had been reduced to a level that even the contracting authority considered insufficient to allow repayment of the loan and recovery of the investment.

62. **Mr. Al-Nasser** (Observer for Saudi Arabia) said that chapter VII was ambitious but that that was not a flaw. The Secretariat was to be commended for its excellent work. The guide would help countries with limited legal expertise to enact up-to-date laws.

63. **Mr. Lalliot** (France) suggested that the title of the chapter might be changed to something like "Legal certainty required for the promotion of private investment in infrastructure".

64. **Mr. Meena** (India) suggested that relevant areas of legislation might include legislation on highways. In discussions on the privatization of highways in India, entrepreneurs had expressed concern that all powers governing traffic movement lay with government departments, whereas they needed certain powers to prevent overloading and resultant damage to the roads.

The meeting rose at 12.20 p.m.

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7 March 2000

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United Nations Commission on International Trade Law
Thirty-second session

Summary record of the 660th meeting
Held at the Vienna International Centre, Vienna, on Wednesday, 26 May 1999, at 2 p.m.

Chairman: Mr. Renger ..... (Germany)

Contents

Privately financed infrastructure projects (*continued*)

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V.00-51964 (E)

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The meeting was called to order at 2.10 p.m.

Privately financed infrastructure projects (*continued*) (A/CN.9/458 and Add.1-9)

Chapter VII. Governing law (A/CN.9/458/Add.8) (*continued*)

General remarks, and the law governing the project agreement (legislative recommendation 1 and paras. 4 and 5) (*continued*)

1. **The Chairman** said that the text for legislative recommendation 1 suggested at the last meeting by the observer for Canada might be variously interpreted. It might be understood to allow the parties to choose a law other than that of the host country to govern the project agreement. That would bring up the question of private international law.

2. **Mr. Wallace** (United States of America) said that he understood the suggested text in the way indicated by the Chairman. He was happy with the present title of chapter VII and understood "governing law" to refer to choice of law.

3. **Mr. Lortie** (Observer for Canada) said that the suggested text would allow the exclusion of a given law. It would be best to avoid a discussion of the issue of private international law. His text was intended as a kind of compromise, stating a general principle. It would allow for the principle of freedom of contract, without opening up the question of private international law.

4. **Mr. Estrella Faria** (International Trade Law Branch) said that it was not quite clear to the Secretariat what the consequence of the suggested text would be. He understood that it was not the purpose of the text to imply a right of the parties to choose the applicable law, but that was what it did seem to imply. It read as a choice-of-law clause.

5. **Mr. Wallace** (United States of America) said he understood the intention to be to suggest that a legislature could, if it wished, authorize the parties to decide what law or laws would govern the project agreement. It was not necessarily a question of foreign law: the reference might be to a particular body of domestic law. The drafting could be changed: instead of "unless provided otherwise" one could say "unless legislation provides otherwise", leaving the Government to decide.

6. **The Chairman** said he thought that the purpose was to allow the contracting authority to deviate from particular laws.

7. **Mr. Wallace** (United States of America) said that the legislature might decide to give a general authorization establishing what might be called "freedom-of-contract" autonomy in infrastructure project arrangements.

8. **Mr. Estrella Faria** (International Trade Law Branch) said that the Secretariat had tried to avoid addressing choice-of-law issues. It would need clear guidance from the Commission if it wished the recommendation and notes to cover that matter.

9. **Mr. Wallace** (United States of America) said that the Canadian suggestion, which would leave the choice to Governments, seemed to have support.

10. **Mr. Lortie** (Observer for Canada) welcomed the suggestion of the United States representative to use the wording "unless legislation provides otherwise".

11. **Mr. Phua Wee Chuan** (Singapore) said that in practice the debate on governing law might be academic, since in preparing the tendering documents for a project the contacting authority would choose the host country's law as the governing law. It was true that UNCITRAL texts frequently referred to the principle of freedom of contract. But in many countries the law did not state whether or not parties could contract out of domestic law. It might be best to highlight the fact in the notes that the domestic law of the host country might contain obstacles to the implementation of the project agreement and that thought might be given to removing those obstacles.

12. **Mr. Meena** (India) said that if a country wanted investment for the purpose of infrastructure development it had to provide conditions attractive to investors. The Commission should therefore feel free to make recommendations that it considered fair to both sides, and it would be up to the individual countries to change their laws in accordance with those suggestions.

13. **Mr. Estrella Faria** (International Trade Law Branch) said that it seemed to be the Commission's desire to amend recommendation 1 along the lines of the suggestion made by the observer for Canada. The notes, as proposed by the representative of Singapore, would then highlight possible obstacles in the way of a decision by the contracting authority, for instance, to choose the applicable law or agree that particular areas of law would not apply.

14. **Mr. Wallace** (United States of America) said that that would be acceptable, as long as points made in the discussion—for example, regarding freedom of contract—were brought out in the notes.

The law governing contracts entered into by the concessionaire (legislative recommendation 2 and paras. 6-8)

15. **Mr. Wallace** (United States of America) asked whether the Secretariat saw recommendation 2 and the notes as applying, for example, to government guarantees and assurances, to a power purchase or fuel supply agreement between a concessionaire and a municipality or to an agreement between local lenders and the concessionaire.

16. He also raised a minor drafting point concerning paragraph 8 of the notes.

17. **Mr. Lalliot** (France), referring to paragraph 7, drew attention to the fact that a European directive contained a provision concerning the law to govern contracts entered into by concessionaires. That could perhaps be taken into account.

18. **Mr. Choukri Sbaï** (Observer for Morocco) said that paragraph 6 stated that it was common for the concessionaire and its contractors to choose a law that was familiar to them and that in their view adequately governed the issues addressed in their contracts. A disadvantage, to which the notes should refer, was the fact that a local judge might not be familiar with the law chosen or with the precedents involved.

19. He asked for clarification of the last sentence of paragraph 6. The concessionaire would in fact be obliged to apply local law to local customers.

20. **Mr. Kashiwagi** (Japan) said that he had difficulty in understanding the suggestion in the first sentence of paragraph 8 that the concessionaire's contractors might be regarded as agents of the contracting authority. He also wondered whether the expression "subsidiary liability" in the second sentence meant "vicarious liability".

21. **Mr. Estrella Faria** (International Trade Law Branch) said, in reply to the United States representative, that it had not been intended to exclude local lenders in paragraph 6. However, there might be limitations in a particular jurisdiction; some jurisdictions might object to the choice of any law other than that of the host country in such circumstances. If it was desired, express reference to local lenders or contractors could be made.

22. Power purchase and fuel supply agreements would often be entered into with government-owned agencies. In some legal systems, including a choice-of-law clause in such agreements would raise concerns similar to those raised by a choice-of-law clause accepted by the contracting authority itself, but the situation might depend on whether the entities concerned were treated as government agencies or as commercial enterprises operating under ordinary commercial law.

23. The treatment of government guarantees might depend on the nature of the guarantee. All those matters could be dealt with in the notes, but would need a rather elaborate discussion.

24. In reply to the Japanese representative's question on paragraph 8, he explained that in some civil law jurisdictions, because the project agreement was an agreement entered into under administrative law, subcontractors would normally be considered agents of the contracting authority and be covered by a particularly strict liability regime applicable to government agencies. The explanation in the notes was somewhat compressed. "Subsidiary liability" in that context was not exactly the same as "vicarious liability".

25. In reply to the observer from Morocco, he said that it was not the intention to suggest that the project agreement would authorize the concessionaire to impose a foreign law on its customers. The host country's conflict-of-law rules would apply, and they might limit the possibility of applying any law other than that of the host country in the circumstances. That point could be made clear in the text.

Legislative recommendation 3 and paragraphs 9-16 of the notes

26. **Ms. Nikanjam** (Islamic Republic of Iran) drew attention to the reference to international law in the second sentence of paragraph 10 of the notes. She believed that domestic law in all legal systems provided appropriate legal protection for investors, and wondered what further protection would be provided by international law.

27. **Mr. Zanker** (Australia) said that paragraph 11 of the notes seemed to be more related to bilateral investment promotion and protection agreements than to legislation. But migration, import control and foreign exchange legislation might need amending to encourage investment, and might not require a treaty of any kind. Perhaps the discussion should be moved to section D.

28. **Mr. Mazini** (Observer for Morocco) said that the last sentence of paragraph 16 as currently drafted seemed to imply that expropriation should be institutionalized as a way of acquiring land needed for a project; such a procedure was in reality exceptional.

29. **Mr. Wiwen-Nilsson** (Observer for Sweden) suggested that a sentence should be added to paragraph 10 to the effect that the protection of investors would include protection of a local concessionaire, to avoid any suggestion that it would apply only to foreign shareholders or foreign lenders.

30. **Mr. Kovar** (United States of America) agreed with what had been said by the observer for Morocco. The potential for misunderstanding of the term "expropriation" had been mentioned at the Commission's last session. Although the draft had been improved, some work was still needed to make it quite clear that what was involved was the normal government ability to acquire land for public projects, and that it did not necessarily concern foreign investment.

31. **Mr. Wallace** (United States of America) proposed the addition of the word "including" after the opening bracket in legislative recommendation 3.

32. He suggested that, in the first sentence of paragraph 12, a reference to the possibility of using property for security should be added.

33. **Mr. Lee Yong-shik** (Observer for the Republic of Korea) said he was not sure that recommendation 3 had anything to add in practice. If it was intended to refer to rules of law "particularly" relevant to privately financed infrastructure projects, the wording could be changed accordingly.

34. He agreed with the point made by the Iranian representative on paragraph 10. To avoid confusion, "appropriate compensation in accordance with international law" might be replaced by "fair compensation".

35. **Mr. Meena** (India) said that when the Indian Government wanted private investment for any project it was its own responsibility to acquire the land before it entered into an agreement with the concessionaire. He suggested that paragraphs 15 and 16 of the notes should be amended to recommend that approach.

36. **Mr. Mazini** (Observer for Morocco) said that the wording of paragraph 16 could perhaps be amended to make it clear that expropriation was an exceptional procedure.

37. **Mr. Lalliot** (France) said that recommendation 3 was inappropriate as a legislative recommendation, particularly with regard to the non-exhaustive list of areas suggested.

38. Paragraph 11 mentioned bilateral agreements. Multilateral agreements could also be relevant to the promotion of investment.

39. The reference in the first sentence of paragraph 12 to property laws reflecting "acceptable modern standards" was insufficiently clear and should perhaps be deleted.

40. In connection with paragraph 16, he believed that the solution would be to refer to the purchase of land as the normal approach and to expropriation as the exception. He was in favour of retaining the word "expropriation" because to use another term would be confusing.

41. **Mr. Moreno Ruffinelli** (Paraguay) said that in his country every case of expropriation required the passing of an ad hoc law providing due guarantees for the owners. Paragraph 16 was important and "expropriation" was the proper term.

42. **Mr. Kovar** (United States of America) agreed that the term "expropriation" could be retained. However, the emphasis in paragraph 16 on speeding up the process might imply recourse to procedures that were less than fair. The Secretariat should look at the drafting to guard against such an implication.

43. With regard to the suggestion that there was no need to mention international law in paragraph 10, he believed that the confidence of foreign investors would be undermined without a reference to international legal standards.

44. **Mr. Choukri Sbaï** (Observer for Morocco) said that the term "expropriation" was the appropriate one. In his country expropriation was used solely out of considerations of public interest and was subject to control.

45. Paragraph 10 of the notes referred to "protection from nationalization or dispossession without judicial review and appropriate compensation". It should be stated that both privatization and nationalization were sovereign rights. Compensation, however, could be claimed in the courts. Paragraph 11 referred to "protection from expropriation and nationalization", without qualification; he suggested that those words be deleted.

46. **Mr. Estrella Faria** (International Trade Law Branch) said that paragraphs 10 and 11 should have used the same expression as was employed in paragraph 25 of draft chapter IV (A/CN.9/458/Add.5), which spoke of

"compulsory acquisition ... against the payment of appropriate compensation ... in accordance with the rules in force in the host country and relevant rules of international law". That formulation might remove some of the concerns that had been expressed in the debate.

47. There would be a problem in changing the term "expropriation". Although that term had a negative connotation for some English speakers, other possible expressions were not understood everywhere and raised translation problems. The term "expropriation" as used in the guide was defined in paragraph 25 of chapter IV.

48. **Mr. Lee Yong-shik** (Observer for the Republic of Korea) said, with regard to the reference to international law, that he could agree to the solution suggested by the Secretariat.

49. **Mr. Zanker** (Australia) thought the word "expropriation" could be avoided if one referred to procedures for compulsory acquisition of land needed for infrastructure projects with automatic compensation based on market value.

50. On the question of compensation, he suggested that the wording "prompt, adequate and effective compensation" be used.

51. **Mr. Phua Wee Chuan** (Singapore) said that the Commission should not go into the issue of the standard of compensation but merely indicate that compensation had to be paid.

The meeting was suspended at 3.45 p.m. and resumed at 4.05 p.m.

52. **The Chairman** said that there seemed to be a general understanding that the compulsory acquisition of land might be necessary and that compensation must be paid. There was no point in embarking on a discussion of the standard of compensation.

Intellectual property law (paras. 17-21)

53. **Ms. Nikanjam** (Islamic Republic of Iran) proposed the addition, after the words "Paris Convention for the Protection of Industrial Property of 1883" in the second sentence of paragraph 18, of the words "and its amendments".

54. **Mr. Choukri Sbaï** (Observer for Morocco) suggested the addition of a sentence stating that it would be advisable for the host country to enact criminal law provisions designed to combat infringements of intellectual property rights.

55. **Mr. Wallace** (United States of America) proposed the inclusion of a mention of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), concluded under the auspices of the World Trade Organization, somewhere in paragraph 18.

56. In the statement "International registration of marks under the Madrid Agreement has effect in several countries" in the third sentence of paragraph 19, it might be better to replace "several" by "many".

57. At the end of paragraph 21, reference should perhaps be made to conventions on copyright and to the various national regimes dealing with computer software and hardware.

58. **Ms. Gioia** (Italy) supported the proposal of the United States representative concerning reference to the TRIPS Agreement.

59. She suggested that the third sentence of paragraph 19 should be made more precise, using the same wording as in the second sentence of paragraph 20.

60. **Mr. Estrella Faria** (International Trade Law Branch) said that the World Intellectual Property Organization (WIPO) would be consulted on the appropriate wording.

Security interests (paras. 22-30)

61. **Mr. Wallace** (United States of America) questioned the reference to a "title registration system" in the third sentence of paragraph 23.

62. He suggested the addition of words such as "and therefore might add to costs" at the end of the penultimate sentence of paragraph 24.

63. **Mr. Wiwen-Nilsson** (Observer for Sweden) thought that the reference in the last line of paragraph 30 should be to paragraphs 23 to 28, not 24 to 29.

64. **Mr. Lalliot** (France) thought that the discussion of security interests might overlap with chapter IV.

65. Some legal systems did not recognize security interests. While chapter IV treated the issue of security interests in a balanced way, paragraphs 22-30 of the notes in chapter VII were clearly biased in favour of security interests. For instance, the last sentence of paragraph 22 spoke of "a modern regime for secured transactions". Should one conclude that any legal system not allowing for security interests was archaic? He would prefer a more balanced presentation reflecting the fact that some legal systems did not allow for the creation of security interests

in relation to public property, in view of the inalienability of such property.

66. In connection with the words "another form of security typically given in connection with certain privately financed infrastructure projects is an assignment to lenders of proceeds from contracts with customers of the concessionaire" in the first sentence of paragraph 28, he noted that the relationship between concessionaire and customer did not necessarily take the form of a contract in all legal systems. Caution must therefore be exercised in the terminology adopted.

67. **Mr. Wallace** (United States of America) suggested that the wording used in the first sentence of paragraph 33 of document A/CN.9/458/Add.5 might be incorporated in the paragraphs under discussion.

68. Perhaps the reference to "proceeds from contracts" in paragraph 28 could be replaced by a more general reference to accounts receivable or moneys owed.

69. **Ms. Nikanjam** (Islamic Republic of Iran) suggested that the words "different organizations" at the end of paragraph 29 should be amended to "relevant organizations".

70. **Mr. Estrella Faria** (International Trade Law Branch) suggested that to accommodate the concern of the French representative the wording of paragraph 34 of document A/CN.9/458/Add.5 might be used.

71. **Mr. Lalliot** (France) agreed with that suggestion. His concern was that due account should be taken of the diversity of existing legal systems. However, his point about the need to avoid duplication in the guide had not been addressed.

72. **The Chairman** said that some repetition and cross-referencing would be inevitable in the guide.

73. **Mr. Morán Bovio** (Spain) said that paragraphs 22 to 30 of the notes were excellent. Some concerns that had been voiced might be met by the convention on assignment in receivables financing being developed by the Working Group on International Contract Practices.

74. **Mr. Choukri Sbaï** (Observer for Morocco) supported the views expressed by the French representative. Perhaps a sentence could be added to the effect that the contracting authority and the concessionaire might reach an agreement on money or property other than public assets that might be used as security.

75. **The Chairman** said it was understood that the point raised by the French representatives would be taken into account.

Company law (paras. 31-34) and accounting practices (para. 35)

76. **Mr. Wallace** (United States of America) proposed some minor drafting changes.

77. **Mr. Lalliot** (France) said that the statement made in the third sentence of paragraph 35 was hard to understand in the context.

78. **Mr. Estrella Faria** (International Trade Law Branch) said that the sentence was indeed out of place in paragraph 35 and should be removed to another context.

79. **Mr. Choukri Sbaï** (Observer for Morocco) suggested the inclusion in paragraph 35 of a reference to the importance of appointing an auditor.

80. **Mr. Maradiaga** (Honduras) proposed the deletion of the reference to "modern" accounting practices in the second sentence of paragraph 35. To say "internationally acceptable" accounting practices would suffice. He was also unhappy with the drafting of paragraph 31.

81. **Mr. Zanker** (Australia) thought that the word "modern" could be replaced by a better word.

Contract law (paras. 36-37)

82. **Mr. Lalliot** (France) thought that the title "Contract law" was too broad, since the reference was only to contracts concluded by the concessionaire.

83. The wording of paragraph 36 did not adequately take into account the fact that in some countries the contracts concerned might be public contracts rather than commercial contracts. They would not necessarily come under private contract law.

84. **Mr. Estrella Faria** (International Trade Law Branch) suggested that the title of the section should be amended to "Private contract law" and the third sentence of paragraph 36 should refer to "an appropriate private contract law", to make the point clear.

85. **The Chairman** said that that solution seemed to be acceptable to the Commission.

Rules on government contracts and administrative law (paras. 38-41)

86. **Mr. Lalliot** (France) said that he was very happy with the substance of the text.

Insolvency law (paras. 42-44)

87. **Mr. Wallace** (United States of America) wondered what the Secretariat intended to say in the second sentence of paragraph 42. The words "economically viable" could perhaps be deleted.

88. In the second line of paragraph 43, the word "priority" might not be appropriate; perhaps a better wording could be found.

89. **Mr. Lalliot** (France) said that he had the same problem with the words "secured lenders" in the third sentence of paragraph 42 as he had mentioned in connection with security interests. There was also a reference in the last sentence to the principle of party autonomy, this time in connection with the contract between the contracting authority and the concessionaire. The arrangements discussed in the last four sentences of the paragraph would not be applicable in some legal systems. Perhaps those sentences, which repeated points discussed elsewhere in the guide, could be dropped.

90. **Mr. Estrella Faria** (International Trade Law Branch) explained that paragraph 42 had been included as a result of the Commission's request in paragraph 37 of its report on the thirty-first session. The Secretariat felt that the best place for that discussion was in paragraph 42, but of course it could be deleted if the Commission so decided.

91. **Mr. Wallace** (United States of America) suggested that the last sentence of paragraph 42 be retained but transferred to paragraph 6, for example.

The meeting rose at 5 p.m.